No. 86-1410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUNTER DOUGLAS, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

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1. Respondent's contention that Petitioner did not assert its preclusion argument below is erroneous. In fact, Petitioner repeatedly urged consideration of the District Court's decision before the Board and later before the Court of Appeals. In its brief to the N.L.R.B., Hunter Douglas stated that:

> Given the [District] Court's finding that there is no reasonable cause to believe the Act was violated, . . . it is difficult to see how General Counsel could

> prevail on the higher threshold of preponderance of the evidence.

Pet. NLRB Br. 14.

As a logical extrapolation from that argument, Petitioner expressly asserted that "a finding should be entered that [Hunter Douglas] did not violate Section 8(a)(1) and (3) of the Act by eliminating the second shift." *Id.* Similarly, in its Reply Brief to the Third Circuit Court of Appeals and again in its Petition for Rehearing *in banc,* Petitioner argued the effect to be given the District Court's opinion in starker terms:

> Since the record provides no support for a finding of reasonable cause to believe that Hunter Douglas violated the Act . . . *a fortiori* it cannot provide support for the Board's finding that Hunter Douglas violated the Act by a preponderance of the evidence.

Pet. C.A. Reply Br. 15.

In this case, Petitioner repeatedly argued that, minimally the Board and the Court of Appeals should have accorded substantial deference to the District Court's decision. Respondent's assertion that Petitioner completely failed to raise the question of issue preclusion reflects an elevation of the term "preclusion" to talismanic status. To the contrary, use of precise terminology is not the *sine qua non* for consideration of an objection by the appellate tribunal. The purpose for the requirement that an objection be raised below is to reasonably apprise the Board of the issue and put it on notice of the likelihood that a party may later pursue that issue on appeal. *May Department Stores Co.* v. *N.L.R.B.,* 326 U.S. 376, 386 n.5 (1945); *Consolidated Freightways* v. *N.L.R.B.,* 669 F.2d 790, 795 (D.C.

Cir. 1981). *Accord N.L.R.B.* v. *Best Products Co., Inc.*, 765 F.2d 903, 904 (9th Cir. 1985); *Local 900, International Union of Electrical, Etc.* v. *N.L.R.B.*, 727 F.2d 1184, 1193 (D.C. Cir. 1984) (objection to retroactive application of N.L.R.B. decision raised although the term retroactive was not used); *cf., N.L.R.B.* v. *Blake Construction Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981) (due process objection raised though petitioner had not expressly mentioned due process). In this case, Petitioner repeatedly raised the issue of the effect to be accorded the District Court's determination that there was no reasonable cause to believe Hunter Douglas violated the Act by eliminating the second shift. Accordingly, the Board was reasonably put on notice of the likelihood that Petitioner would pursue the matter further.

2. Respondent misapprehended the purpose for which Petitioner cited the cases relied upon by the First Circuit in *Walsh* v. *International Longshoremen's Ass'n, AFL-CIO*, 630 F.2d 864 (1st Cir. 1980). In stark contrast to the Third Circuit's refusal to consider the record of the 10(j) proceeding, the First Circuit, in *Walsh*, concluded that under certain circumstances the N.L.R.B. can be precluded from deciding an issue the merits of which had been fully presented to and decided by the District Court in a 10(l) proceeding. In reaching that conclusion, the First Circuit explicitly relied upon *Madden* v. *Perry*, 264 F.2d 169 (7th Cir. 1959), *cert. denied*, 360 U.S. 931 (1959); *Consentino* v. *Local 28*, 268 F.2d 648 (8th Cir. 1959) and *N.L.R.B.* v. *Acker Industries*, 460 F.2d 649 (10th Cir. 1972), stating that "all three suggest, although they do not actually hold, that decisions under Section 10(l) would have the same preclusive effects as any other decision". *Walsh*, 630 F.2d at 868, n.6. Respondent's attempt to distinguish the hold-

ings of those cases ignores the reasons for which they were cited, i.e., their broader fundamental policy implications. Those policy implications did not escape the ken of the First Circuit, which relied upon them in reaching its decision. The Third Circuit however, did not draw the same conclusions; rather, it held that the District Court's decision had no effect whatsoever. This Court should resolve that conflict.

3. Respondent asserts that, because the Board did not make credibility findings that differed from those of the ALJ, the Court of Appeals had no occasion to apply a heightened level of scrutiny in its review of the record. Petitioner reasserts that the Board did make credibility findings and that strict scrutiny was mandated at the appellate level.* However, even assuming *arguendo,* that the Board did not make contradictory credibility findings to those made by the ALJ, the Court of Appeals was still bound to review the record with a heightened level of scrutiny. As a newly decided Fifth Circuit case holds, whenever the Board makes contradictory findings to those of the ALJ, regardless of whether they are credibility find-

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* Respondent's assertion is belied by the fact that both Respondent and the Court of Appeals conceded that the Board did indeed make such a finding when it held that Petitioner's stated motives for eliminating the second shift were "not credible." Brief in Opp. p.5. The question of motive necessarily turns on credibility and is determinative of whether an employer committed an unfair labor practice. *See Nelson* v. *Interior Board of Land Appeals,* 598 F.2d 531, 533 (9th Cir. 1979); *NLRB* v. *Colonial Haven Nursing Home, Inc.,* 542 F.2d 691, 703 (7th Cir. 1976). Accordingly, the Board necessarily judged the credibility of Petitioner's witnesses when it disbelieved their testimony concerning Petitioner's motives for eliminating the second shift. That assessment is precisely the type of contradictory finding that mandate stricter scrutiny by the Court of Appeals.

ings, the entire record "must be subjected to particular scrutiny" which "is more searching than it is when the Board and the ALJ are in agreement". *Centre Property Management* v. *N.L.R.B.*, 807 F.2d 1264, 1268 (5th Cir. 1987). Although contradictory credibility findings mandate an even more rigorous examination of the record, any contradictory findings, such as those made below by the Board, still should have been subjected to heightened scrutiny by the Court of Appeals. *Id.*

4. Respondent's brief confirms the Board's lack of understanding of the proofs required to set forth a *prima facie* case in a Section 8(a)(3) action. The Board bears the burden of proving each element of its case before the burden shifts to the employer to prove its actions were not motivated by anti-union sentiment. Respondent cites to four facts that the Board deemed to be part of General Counsel's *prima facie* case: that the layoff was abrupt, that it came at the time of the union drive, that Santalla had anti-union animus, and that Santalla had recommended the elimination of the second shift. Brief in Opp. p. 5. Santalla, howerever, was Hunter Douglas' witness, as was George Shouldis, who testified that the suggestion to terminate the second shift came from Santalla. In short, General Counsel failed to prove two of the four facts upon which Respondent relies to support the N.L.R.B.'s find of a *prima facie* case. Instead, Respondent attempts to rely on facts adduced in *Petitioner's* affirmative defense to support General Counsel's *prima facie* case. This Respondent cannot do; *Wright Line* requires General Counsel to prove its *prima facie* case *on its own case.*

Respectfully Submitted,

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